STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Hood, P.J., Holbrook, Jr., J.J., and Owens, J.J.

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,

Docket No. 122830

Plaintiffs/Appellants,

vs.

THE STATE OF MICHIGAN,

Defendant/Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, and GAMING ENTERTAINMENT, LLC,

Intervening-Defendants-Appellees.
_____/

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BRIEF OF AMICI CURIAE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, HANNAHVILLE INDIAN COMMUNITY, KEWEENAW BAY INDIAN COMMUNITY, LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, AND MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

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STATEMENT OF JURISDICTION

Taxpayers of Michigan Against Casinos and Laura Baird (collectively "TOMAC") appeal under MCR 7.301(A)(2) the decision of the Court of Appeals dated November 12, 2002, Ct of Appeal Op (App at 122a), reversing the decision of the Ingham County Circuit Court dated January 18, 2000, Cir County Ct Op (App at 106a). Pursuant to MCR 7.306(C), this Court may consider this Brief in support of the Appellees' position. The Amici Curiae does not contest the Supreme Court's jurisdiction in this case.

STATEMENT OF RELIEF SOUGHT

The Amici Curiae Grand Traverse Band of Ottawa and Chippewa Indians, Lac Vieux Desert Band of Lake Superior Chippewa Indians, and Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, join the Defendant-Appellee, State of Michigan, in requesting that this Court affirm the Court of Appeals' November 12, 2002 decision as supported by fact, law and public policy. More particularly, the Amici Curiae seek an order from this Court providing that the Indian Gaming Regulatory Act preempts Michigan Law regarding the State's ability to regulate gambling on Indian land, and that the use of the resolution process to authorize Indian gaming compacts does not violate Michigan's Constitution. Further, should this Court overturn the Court of Appeals' decision, the Amici Curiae request that this Court's order apply prospectively in recognition that the four tribes and the Gun Lake Tribe have detrimentally relied on the validity of their compacts.

STATEMENT OF QUESTIONS INVOLVED

I. Did the Michigan Legislature effectively approve the compacts at issue in this case when it passed a concurrent resolution rather than passing a bill?

The Court of Appeals Answer: Yes.

The Trial Court Answer: No.

Plaintiffs-Appellants Answer: No.

Defendants-Appellees Answer: Yes.

Amici Curiae Answer: Yes.

APPENDIX OF AMICI CURIAE

Appendix 1 = Letter from Gov. John Engler to John M. Peebles (May, 2000)

INTRODUCTION AND INTEREST OF AMICI

Amici curiae Grand Traverse Band of Ottawa and Chippewa Indians ("Grand Traverse Band"), Hannahville Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Lac Vieux Desert Band"), Keweenaw Bay Indian Community, and Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Gun Lake Tribe") (collectively, the "Amici Tribes") are all federally recognized Indian Tribes. The Grand Traverse Band, the Hannahville Indian Community, the Lac Vieux Desert Band, and the Keweenaw Bay Indian Community, are signatories to the Class III gaming compacts between the Tribes and the State of Michigan signed in 1993 ("1993 Compacts"). See, e.g., Lac Vieux Desert Band Compact, available at http://www.michigan.gov/documents/LVD_Compact_70616_7.pdf (last visited Dec 21, 2003). The Amici Tribes strongly object to the amicus curiae brief filed on behalf of the plaintiffs by the seventh 1993 compacting Tribe, the Sault Ste. Marie Tribe of Chippewa Indians.

Without question, the briefs filed by the Amici Curiae Sault Ste. Marie Tribe of Chippewa Indians and the Grand Rapids Area Chamber of Commerce (GRACC) are motivated by purely economic competitive concerns. The Sault Tribe, which already owns and operates several Indian casinos in the Upper Peninsula, also owns the Greektown Casino in Detroit, Michigan, that generates over a quarter billion dollars per year in revenues. See Detroit Casinos Attract 12% More Cash in 2002, Detroit News, Jan 16, 2003, available at www.detnews.

com/2003/business/0301/16/b01-61401.htm (last visited Jan 16, 2003). Moreover, in the waning days of the Engler Administration, the Sault Ste. Marie Tribe entered into an agreement with the Governor for the purposes of opening a gaming facility in Romulus. See An Act to provide for and approve the settlement of certain land claims of the Sault Ste. Marie Tribe of Chippewa Indians, HR 2793, 108th Cong §§ 1(a), (c) (2003). The possibility of opening a new casino in Romulus remains viable for the Sault Ste. Marie Tribe. See Gaming Plans Still Need Work, Detroit News, December 11, 2003, available at www.detnews.com/ 2003/metro/0312/11/a02-5082.htm (last visited Dec. 11, 2003). GRACC apparently represents the interests of Grand Rapids merchants that object to the proposed gaming facility in Bradley, Michigan that would be owned by the Gun Lake Tribe. See GR Chamber Contests Tribe's Casino Plans, Penassee Globe, March 17, 2003, available at http://www.penasee.com/news/story.asp?id= 453055147 (last visited Dec. 14, 2004).

It is clear that the interests of these amici in state constitutional violations are secondary to their economic interests. Cf. American Greyhound Racing, Inc v Hull, 305 F3d 1015, 1026 (CA9 2002) ("The plaintiffs sought this injunction to avoid competitive harm to their own operations. The general subject of gaming may be of great public interest, but the rights in issue between the plaintiffs in this case, the tribe and the state are more private than public."); Sokaogon Chippewa Community v Babbitt, 214 F3d 941, 947 (CA7 2000) ("[I]t is hard to find anything

in [IGRA] that suggests an affirmative right for nearby tribes to be free from economic competition.").

The Amici Tribes strongly support the brief filed by the four Michigan Indian Tribes that entered into the Class III gaming compacts with the State of Michigan ("1998 Compacts"). Since the Amici Tribes are aware that the briefs of the State of Michigan, the Intervening Defendants, and the four 1998 Compact Tribes will focus on the merits of the case, this brief will focus on the public policy reasons for upholding the decision of the Court of Appeals and, in the alternative, the equitable application of a ruling by this Court that the compacts should be approved by legislation.

STATEMENT OF FACTS

The history of Indian gaming in the State of Michigan is critical to a full understanding of the instant litigation. In the early 1980s, several Michigan Indian Tribes commenced gaming operations within their reservations, including high-stakes bingo and casino-style gaming. In September of 1980, Bay Mills Indian Community commenced bingo operations. In 1983, the Saginaw Chippewa Tribe of Indians began to operate high-stakes bingo games on its reservation. With the assistance of grants and loan guarantees from the United States Department of Housing and Urban Development and the Bureau of Indian Affairs to help construct a suitable building, the Grand Traverse Band of Ottawa and Chippewa Indians commenced bingo operations in 1984. In November of 1985, the Keweenaw Bay Indian Community commenced casino operations. In 1986, the

Lac Vieux Desert Band of Lake Superior Chippewa Indians constructed a building at the cost of $150,000, funded by bank loans, and commenced gaming operations there in 1987.

In 1985, the United States filed suit against five Indian Tribes—the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, the Keweenaw Bay Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, and the Hannahville Indian Community—for declaratory relief and a permanent injunction prohibiting the five Tribes from operating casinos on tribal land before then-Chief Judge Douglas Hillman. See United States v Bay Mills Indian Community, 692 F Supp 777, 778 (WD Mich 1988), vacated at the request of the parties, 727 F Supp 1110 (WD Mich 1989). Before Judge Hillman could issue a decision in Bay Mills Indian Community, the United States Supreme Court decided California v Cabazon Band of Mission Indians, 480 US 202; 107 S Ct 1083; 94 L Ed 2d 244 (1987). In Cabazon Band, the Supreme Court held that state and local laws regulating gaming are pre-empted by federal law. See id. at 220-21. Moreover, the Court acknowledged the important federal and tribal interest in the promotion of tribal "self-determination and economic development." Id. at 219. In August of 1988, Judge Hillman, relying in part on the Cabazon Band decision, refused to grant the United States' request for declaratory and injunctive relief on the basis that federal interests in tribal self-government outweighed the interest in shutting down the Tribes' gaming facilities. See Bay Mills Indian Community, 692 F Supp at 781, 782. Of particular note to Judge

Hillman was that many of the Tribes began gaming with the financial assistance of federal agencies. See id at 779, 781.

Shortly thereafter, Congress enacted the Indian Gaming Regulatory Act (IGRA). See 25 USC §§ 2701 et seq. Congress codified the federal and tribal interests recognized in Cabazon Band, stating that IGRA was intended to promote "tribal economic development, self-sufficiency, and strong tribal governments." § 2702(1). IGRA authorized Class III gaming on tribal lands "in conformance with a Tribal-State compact entered into by the Indian tribe and State." § 2710(d)(1)(C). IGRA required the states to negotiate for Class III compacts in good faith, see § 2710(d)(3)(A), and authorized the Indian Tribes to sue a state in federal district court if it refused to negotiate in good faith, see § 2710(d)(7). In 1990, six of the seven Michigan Indian Tribes that were federally recognized sued the State of Michigan for not negotiating in good faith. See Sault Ste Marie Tribe of Chippewa Indians v State of Michigan, 800 F Supp 1484, 1486 (WD Mich 1992), aff'd, 5 F3d 147 (CA6 1993) ("Sault Ste. Marie I"). The district court dismissed the Tribes' suit on Eleventh Amendment grounds and the Sixth Circuit affirmed. See 5 F3d at 149. Upon dismissal by the district court, the Tribes, at the district court's suggestion, substituted the Governor as the defendant in lieu of the State under the theory that a state governmental official may be sued for declaratory and injunctive relief. See Seminole Tribe of Florida v Florida, 517 US 44, 72 n 16; 116 S Ct 1114; 134 L Ed 2d 252 (1996) ("[A]n individual may obtain injunctive relief under Ex parte Young in order to remedy a state officer's ongoing violation of

federal law.") (citing Ex parte Young, 209 US 123; 28 S Ct 441; 52 L Ed 714 (1908)). Within two months of the Sixth Circuit's decision, the six Tribes (with the Saginaw Chippewa Tribe intervening as the seventh) and the State of Michigan entered into a consent judgment that required each tribal party and the Governor to enter into a Class III gaming compact. See Consent Judgment, Sault Ste Marie Tribe of Chippewa Indians v Engler, No. 1:90 CV 611 (WD Mich, Aug 20, 1993), available at http://www.michigan.gov/documents/SSM_v_Engler_Stip_Consent_70619_7.pdf (last visited Dec 17, 2003). In the Stipulation for Entry of Consent Judgment, the Tribes agreed to a provision that required each Tribe pay eight percent of net win generated from electronic games of chance at each Indian gaming facility to the Michigan Strategic Fund. See Stipulation for Entry of Consent Judgment at 4 (¶ 6), Sault Ste Marie Tribe of Chippewa Indians v Engler, No. 1:90 CV 611 (WD Mich, Aug 20, 1993), available at http://www.michigan.gov/documents/SSM_v_Engler_Stip_Consent_70619_7.pdf (last visited Dec 17, 2003). The eight percent payments were to be made only as long as the Tribes collectively enjoyed the exclusive right to game in the State. See id at 5 (¶ 7). The Tribes also were required to submit payments to local units of government amounting to two percent of net win from electronic games of chance at each Indian gaming facility. See id at 5-6 (¶ 8).

After the settlement of Sault Ste. Marie I and the execution and approval of the 1993 compacts, the provisions relating to the funds generated for the Michigan Strategic Fund by the Stipulation for Entry of Consent Judgment were challenged

in circuit court on the basis that they violated the Appropriations Clause of the Michigan Constitution, see Const 1963, art 9, § 17, and the Separation of Powers Clause, see Const 1963, art 3, § 2. See Tiger Stadium Fan Club, Inc v Governor, 217 Mich App 439, 442; 553 NW2d 7 (1996), lv denied, Hart v Engler, 435 Mich 866; 552 NW2d 180 (1996). The Michigan Court of Appeals held that the Stipulation provisions violated neither constitutional provision and rejected the challenge. See 217 Mich App at 442.

Subsequently, another suit was brought by an individual to compel the disclosure of six documents relating to the negotiations between the 1993 compact Tribes and the Governor in compliance with the Michigan Freedom of Information Act. See McCartney v Attorney General, 231 Mich App 722, 725; 587 NW2d 824 (1998), lv denied, 460 Mich 73; 601 NW2d 101 (1999). The plaintiff argued that the documents should be disclosed because the Michigan Constitution did not give authority to the Governor to negotiate and execute the 1993 compacts and the attorney-client privilege doctrine did not apply to actions by the Governor taken outside the scope of his authority. The Michigan Court of Appeals rejected the plaintiff's argument, finding that the Governor had authority to negotiate with the Tribes over gaming and added, in dicta, that the Legislature had authority to ratify the compacts by resolution. See id. at 726-30.

In 1996, the People of the State of Michigan adopted "Proposal E" creating the Michigan Gaming and Revenue Act (codified at MCL §§ 432.201 – 432.216). Subsequently, the State Legislature authorized the granting of three licenses for

casino gaming in Detroit and created the Michigan Gaming Control Board, see MCL §§ 432.204, 432.206. At that point, the 1993 Compact Tribes informed the State of Michigan that they would cease making payments to the State in accordance with the Stipulation for Entry of Consent Judgment provisions that guaranteed exclusive rights to the seven Tribes to operating casino-style gaming facilities within the state borders. The 1993 Compact Tribes argued that, since the People of the State of Michigan and the State Legislature enacted the Act, their exclusive right to game was terminated. The State moved the federal district court to force the Tribes to continue the payments. The district court agreed with the State and the Sixth Circuit affirmed. See Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F3d 367 (CA6 1998) ("Sault Ste. Marie II").

In 1994, Congress granted federal recognition to the Little Traverse Bay Bands of Odawa Indians ("Little Traverse Bay Bands"), the Little River Band of Ottawa Indians ("Little River Band"), and the Pokagon Band of Potawatomi Indians (Pokagon Band"). See 25 USC §§ 1300j (Pokagon Band); 1300k (Little Traverse Bay Bands and Little River Band). In 1995, the Bureau of Indian Affairs granted federal recognition to the Nottawaseppi Huron Potawatomi Band. See 60 Fed Reg 66315 (Dec 21, 1995). In December 1998, the Michigan Legislature approved the four compacts at issue in the instant matter by House Concurrent Resolution 115. See House Journal No. 83, at 48-49 (Dec 10, 1998); Senate Journal No. 76, at 4-5 (Dec 11, 1998).

In 1998, the 1993 Compact Tribes asserted that execution and approval of the 1998 Compacts terminated the exclusivity the 1993 Compact Tribes had bargained for in exchange for the 8 percent payments. When the State sought to enforce the 1993 compact provisions again, the federal district court disagreed with the State and allowed the 1993 Compact Tribes to cease making 8 percent payments to the State. See Sault Ste Marie Tribe of Chippewa Indians v Engler, 93 F Supp 2d 850, 854 (WD Mich 2000), aff'd, 271 F3d 235 (CA6 2001) ("Sault Ste. Marie III").

The history of the 1998 compacts is just as litigious as the 1993 compacts. In 1999, before any of the four 1998 compact Tribes could begin gaming operations in accordance with their compacts, the Sault Ste. Marie Tribe filed suit against the United States to stop the operation of the Victories Casino by the Little Traverse Bay Bands of Odawa Indians. See Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States, 78 F Supp 2d 699, 700 (WD Mich 1999), aff'd, 288 F3d 910 (CA6 2002) ("Sault Ste. Marie IV"). The Sixth Circuit ultimately dismissed the suit on the basis that the Sault Ste. Marie Tribe did not have standing to challenge the operation of the Victories Casino. See 288 F3d at 917. Also, the same plaintiffs in this matter brought suit in federal court challenging the approval of the 1998 compacts by the Secretary of Interior. See Baird v. Norton, 266 F3d 408, 409 (CA6 2001). The Sixth Circuit affirmed the district court's dismissal of the suit on the basis that the plaintiffs had no Article III standing. See id. at 410.

In 1998, the Gun Lake Tribe was granted federal recognition by the Bureau of Indian Affairs. See 63 Fed Reg 56936 (Oct 23, 1998). Since that time, the Tribe has consistently been encouraged by former Governor Engler and Legislators to pursue compact approval through a concurrent resolution as had been done for the previous eleven compacts. See, e.g., Letter from Gov. John Engler to John M. Peebles at 1-2 (May 3, 2000) ("Engler Letter").[1] The Tribe gained the necessary approval from the Michigan Legislature on December 10, 2002. See SR 279 (Dec 10, 2002); HR 606 (Dec 10, 2002).

SUMMARY OF ARGUMENT

The Amici Tribes firmly believe the Class III Gaming Compacts at issue in this case are valid under Michigan law. There are considerable benefits that have come to the Michigan Indian Tribes, the State of Michigan (and its taxpayers), and dozens of local units of government through the gaming operations conducted in accordance with the 1998 compacts. Indian gaming generally has been an outstanding economic development tool for the purpose of funding governmental services in Michigan and nationally. Negating the 1998 compacts could create intense difficulty for both the Tribes that conduct gaming operations under those compacts and the communities that enjoy increased employment, governmental revenue, and tourism revenues.

Though the Amici Tribes firmly believe there is strong legal authority to support the validity of the 1998 compacts, in the event this Court rules in favor of

[1] Attached as Appendix 1.

the plaintiffs, the Amici Tribes would argue that any adverse ruling should apply only prospectively to future legislative approval of future compacts. Because of the long-standing reliance by the Tribes, the State, and the local units of government on the established process for approval of the existing compacts, and because all of these tribal and non-tribal governments have relied heavily on in gaming revenue resulting from the existing process, there are sound equitable reasons for limiting any adverse ruling to prospective application. In the event this Court rules against Appellees, this Court may be effectively overruling prior precedents of the Court of Appeals that lent support to the validity of all Class III Gaming Compacts approved by resolution, another factor that strongly compels this Court to limit its ruling.

In sum, Indian gaming in Michigan is extremely beneficial—not only to the gaming Tribes—but to the surrounding community and to the State of Michigan.

ARGUMENT

I. Gaming Under the 1993 and 1998 Compacts Fulfills the Purposes of the Indian Gaming Regulatory Act to Promote Tribal Economic Development, Self-Sufficiency, and Strong Tribal Governments.

Indian gaming arose out of the extreme poverty and devastation caused by the states and federal government and the non-Indian population in their drive to destroy, assimilate, and exploit Indians and Indian Tribes. See Ray Halbritter & Stephen Paul McSloy, Employment or Dependence? The Practical Value and Meaning of Native American Sovereignty, 26 NYU J Int'l L & Pol'y 531, 567-68 (1994) ("The casino is not a statement of who we are, but only a means to get us

where we want to be. We had tried poverty for 200 years, so we decided to try something else."). Prior to the advent of gaming revenues, many Indian Tribes suffered from a lack of resources and a tax base with which to raise revenue. "The Tribes have endured nearly two centuries of severe economic deprivation and forced dependency. This has lead to extreme poverty conditions on many reservations that are unrivaled in other parts of the country." Rebecca Tsosie, Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act, 29 Ariz St L J 25, 79 (1997) (citing Frank Pommersheim, Braid of Feathers: American Indian Law and Contemporary Tribal Life 11-13 (1995)). Unlike federal, state, and local governments, Indian Tribes have little or no tax base from which to draw upon to fund government services. See Pueblo of Santa Ana v Hodel, 663 F Supp 1300, 1315 n 21 (D DC 1987) ("[T]he Indians have no viable tax base and a weak economic infrastructure. Therefore they, even more than the states, need to develop creative ways to generate revenue."). Indian Tribes began gaming to fund critical services, giving their people the opportunity to survive. As Ray Halbritter, a prominent Tribal leader said, for many Indian Tribes, gaming revenues "bridge the gap between merely surviving and thriving." Kristen A. Carpenter & Ray Halbritter, Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming, 5 Gaming L Rev 311, 323 (2001) (quoting Statement of Ray Halbritter, Oneida Nation Annual Report 2000, Section I). The Tribes that began gaming looked at the state and federal law that cabined their jurisdictional

authority. Following the law that had been forced upon the Tribes by the non-Indian governments and courts to the letter, the gaming Tribes tentatively explored what means they had available to serve the needs of their people. Gaming is about providing government services for a people with little or no alternatives, as the United States Supreme Court recognized in Cabazon Band:

> The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.

Cabazon Band, 480 US at 218-19. Indian Tribes are not for-profit corporations who are interested only in maximizing dividends for investors. See, e.g., Trudgeon v Fantasy Springs Casino, 71 Cal App 4th 632, 640; 84 Cal Rptr 2d 65 (1999) (acknowledging that Indian casinos are "governmental in nature"); Gavle v Little Six, Inc, 555 NW2d 284, 295 (Minn 1996) (recognizing "the unique role that Indian gaming serves in the economic life of here-to-fore impoverished Indian communities across this country"), cert denied, 524 US 911; 118 S Ct 1275; 141 L Ed 2d 155 (1998). Indian Tribes are governments with a clear constituency.

As such, Tribes use gaming revenues to provide critical governmental services. See State ex rel Stephan v Finney, 251 Kan 559, 561; 836 P2d 1169 (Kan 1992) ("[Indian gaming] income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal

funding.") (quoting P L 100-497: Indian Gaming Regulatory Act, S Rep 446, 100th Cong, 2nd Sess 3 (1988)); American Greyhound Racing Inc v Hull, 146 F Supp 2d 1012, 1063 (D Ariz 2001) (noting that gaming revenues allow Tribes to fund housing and infrastructure projects), rev'd on other grounds, 305 F3d 1015 (CA9 2002). Tribal gaming resulted from the enormous unmet needs of Indians and Indian Tribes nationwide:

> The gambling industry on Native American lands has evolved in response to several needs within Indian Country, including: (1) The need to finance economic development ventures; (2) the need to create jobs for tribal members; (3) the need to supplement and enhance funding of existing tribal programs; (4) the need to create new tribal programs to meet the needs of members; and (5) the need to relieve tribal dependence on federal contracts and grants. [Thomas L. Wilson, Indian Gaming and Economic Development on the Reservation, 68 Mich B J 380, 380 (1989)].

Even today, federal funding for Tribal programs and services is declining in real dollars, leaving considerable gaps in Tribal programs. See, e.g., United States Commission on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country 9 (July 2003), available at http://www.usccr.gov/pubs/na0703/na0731.pdf (last visited December 15, 2003) (noting that possibly $2.8 billion would be necessary to meet education and health care needs of Indians nationwide).

Many Tribes now operate casinos that provide critical employment opportunities for Tribal Members. See, e.g., Lac du Flambeau Band of Lake Superior Chippewa Indians v State of Wisconsin, 743 F Supp 645, 646 (WD Wis 1990) ("In May 1989 83% of the [casino] employees were tribal members; in

February 1990 just under 80% of those employed were tribal members."); Kathryn R.L. Rand & Steven A. Light, Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity, 4 Va J Soc Pol'y & L 381, 402 (1997) ("In Minnesota, for example, Indian gaming is the state's seventh largest industry, creating over 10,000 jobs directly and 20,000 jobs indirectly."); Implementation of the Indian Gaming Regulatory Act, Hearing Before the Select Committee on Indian Affairs, 102nd Cong 6 (1992) (Statement of Sen Thomas A. Daschle) (noting that unemployment in many reservations has dropped from 80 percent to virtually zero due to Indian gaming). Many gaming Tribes employ large numbers of non-Indians from the surrounding community. See, e.g., Saratoga County Chamber of Commerce, Inc v Pataki, 100 NY2d 801, 836 n 4; 766 NYS2d 654; 798 NE2d 1047 (2003) (Read, J, dissenting) (noting that the Oneida Indian Nation's Utica, New York casino employed 3300 people with an annual payroll of $70 million), cert denied, __ US __; 124 S Ct 570; __ L Ed 2d __ (2003). See also Kathryn R.L. Rand, There Are No Pequots on the Plains: Assessing the Success of Indian Gaming, 5 Chap L Rev 47, 76 (2002) ("[E]ven relative modest casino revenues and levels of casino employment benefit surrounding non-Indian communities, as well as the state economy."); Rand & Light, supra, at 404 ("Indian casinos have created nearly 140,000 jobs in the United States, approximately eighty-five percent of them held by non-Indians."). Moreover, employment of Tribal Members at their own Tribe's gaming facilities reduces the financial burden on the State's social services. See Sherry M. Thompson, The

Return of the Buffalo: An Historical Survey of Reservation Gaming in the United States and Canada, 11 Ariz J Int'l and Comp L 520, 522 n 7 (1994) ("[T]he number of people on welfare on four rural reservations in Minnesota dropped sixteen percent after casinos were opened."). Perhaps most importantly, the economic benefits of gaming do not stop at the reservation borders. In North Dakota, for example, where Indian gaming is modest in comparison to Indian gaming in Michigan, "the annual economic benefits to the state resulting from the [five] casinos' payroll and purchases totals nearly $125,000,000." See Rand, supra, at 76 (citing North Dakota Indian Gaming Association, Opportunities and Benefits of North Dakota Tribally Owned Casinos 11 (2000)).

Conversely, when Indian gaming facilities close down, Indian communities—and the non-Indian communities dependent on Tribal gaming—are ravaged. It is axiomatic that the loss of casino jobs could devastate Indian communities. See, e.g., Wisconsin Winnebago Nation v Thompson, 22 F3d 719, 722 (CA7 1994) ("[When] the [Indian gaming facilities] were forced to close[,] over 300 Winnebago employees were laid off."). "In the absence of the casino jobs, it is likely that the tribal member employees will not find replacement jobs, will be unemployed, and will be forced to rely upon some form of public assistance relief from the state or federal government and from tribal social services programs." Lac du Flambeau, 743 F Supp at 647. The closure of Indian casinos and the resulting loss of governmental revenue could force Tribal governments to shut down fundamental and critical governmental services. See,

e.g., id ("Without casino revenue, the band will not be able to support tribal programs and services."). See generally Note, In Defense of Tribal Sovereign Immunity, 95 Harv L Rev 1058, 1073 (1982) ("Unlike other governmental bodies, Indian tribes would find the loss of assets more difficult to replace because tribes have only a limited revenue base over which to spread any losses.") (citing Atkinson v Haldane, 569 P2d 151, 169 (Alaska 1977)). The impact of the closure of Tribal gaming facilities would reverberate throughout the non-Indian local communities and the State as well, with its concomitant increase in non-Indian employment, the swelling of the welfare rolls, and the reduced non-Indian state income tax base.

The benefits of Indian gaming have accrued to the Michigan Indian Tribes in a striking fashion. For example, the gaming revenues derived from the facilities operated by the Grand Traverse Band of Ottawa and Chippewa Indians contribute immensely to the Band's governmental services and Tribal Member employment opportunities and the facility itself contributes directly to the local economy as well:

> In fiscal year 2001, Turtle Creek provided approximately 89% of the Band's gaming revenue. The casino now employs approximately 500 persons, approximately half of whom are tribal members. Revenues from the Turtle Creek Casino also fund approximately 270 additional tribal government positions, which administer a variety of governmental programs, including health care, elder care, child care, youth services, education, housing, economic development and law enforcement. The casino also provides some of the best employment opportunities in the region, and all of its employees are eligible for health insurance benefits, disability benefits and 401(k) benefit plans. The casino also provides

> revenues to regional governmental entities and provides significant side benefits to the local tourist economy.

Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, 198 F Supp 2d 920, 924 (WD Mich 2002) ("Grand Traverse Band II"), appeal docketed, No. 02-1679 (CA6 2003); see also Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, 46 F Supp 2d 689, 705 (WD Mich 1999) ("Grand Traverse Band I") (discussing the benefits of Indian gaming for the Band, its Members, and its Indian and non-Indian employees). Gaming revenues fund numerous other Tribal government services such as underfunded or discontinued federal government programs, loan programs from Tribal Member small businesses, contributions to local charities, Tribal land acquisition projects, housing projects, Tribal building projects, and many others. See Wilson, supra, 68 Mich B J at 384 n 34; Richard Williams, Tribal Chairman of the Lac Vieux Desert Band of Lake Superior Chippewa Indians, Testimony Before the National Gambling Impact Study Commission (November 9, 1998), available at www.indiangaming.org/library/resources/index.htm (last visited Dec. 14, 2003).

Tribal unemployment rates for the Michigan gaming Tribes have dropped at an incredible rate. See L Renee Lieux, Split, Double Down, or Hit Me: An Analysis of the 1993 and 1997 Class III Michigan Gaming Compacts, 76 U Det Mercy L Rev 853, 854 (1999) ("In 1985, prior to the advent of Indian gaming, the tribal unemployment rate in Michigan was sixty-five percent; 1994, the tribal

unemployment rate had dropped to five percent.") (citing The Indian Gaming Regulatory Act of 1988, Hearings Before the Senate Committee on Indian Affairs, 95th Cong 83 (1998) (Statement of Kevin Gover, Assistant Secretary of Interior for Indian Affairs)). The Saginaw Chippewa Tribe, for example, was able to "significantly reduce its unemployment, which once approached 50% in 1980." Wilson, supra, 68 Mich B J at 383. Before gaming, the residents of Peshawbestown, where the seat of government for the Grand Traverse Band is situated, suffered from 70 percent unemployment and crippling poverty. See George Weeks, Mem-ka-weh: Dawning of the Grand Traverse Band of Ottawa and Chippewa Indians 106 (1992). Lac Vieux Desert Band Tribal Member unemployment also approached 70 percent in the late 1970's. See Williams, supra. Many of those employed at Michigan Indian gaming facilities were on public assistance prior to their employment as the casino. See Joseph M. Kelly, Indian Gaming Law, 43 Drake L Rev 501, 544 n 330 (1995) ("Of current workers, 37 percent were welfare recipients.") (quoting University Associates, Economic Impact of Michigan's Indian Gaming Enterprises (Aug 1992)). The closure of Michigan Indian gaming facilities could create serious economic difficulty for Michigan Tribes. See, e.g., Grand Traverse Band I, 46 F Supp 2d at 705 (denying the federal government's motion to enjoin a tribal gaming facility because to do so would "create substantial financial hardship to the Band, its members and employees"); Bay Mills Indian Community, 692 F Supp at 781 ("[T]he record

discloses that enjoining defendants' operations would cause substantial financial hardship to the tribes and their members.").

A decision adverse to the 1998 Compacts could create additional, multiplying negative effects on Tribal governments. The compacting Tribes are dependent upon the revenue streams arising out of the gaming conducted in accordance with the 1998 Compacts. Many Tribes have "sold bonds using the revenue stream from their gaming operations." John F Petoskey, Doing Business With Michigan Indian Tribes, 76 Mich B J 440, 443 (1997). Tribes leverage the expected revenue streams to finance "essential governmental services" such as housing, infrastructure, and administration construction. See id (citing Tribal Tax Status Act, 26 USC § 7871).

The compacting Tribes have expended millions of dollars to create – from scratch – an Indian gaming industry in their respective regions within the State of Michigan in direct reliance on the gaming compacts entered into with the State. For example, Lakes Entertainment, Inc. has expended over $40 million in the expectation that the 1998 Compact will allow the Pokagon Band to commence gaming operations in the near future. See Lakes Entertainment, Inc Provides a Company Overview (Oct 8, 2003), available at http://biz.yahoo.com/bw/031008/85079_1.html (last visited December 15, 2003). Cf. Saratoga County Chamber of Commerce, 100 NY2d at 836 (Read, J, dissenting) (noting that the St. Regis Mohawk Tribe expended $30 million to develop its gaming facility in reliance of its compact with the State of New York). In the event this Court

invalidates the 1998 compacts, the 1998 Compact Tribes may have wasted their money spent in developing casino gaming facilities, along with the accompanying hotels, resorts, and other entertainment facilities.[2]

The benefits of gaming extend to the non-Indian communities near Tribal gaming facilities. For example, the compacting Tribes pay large sums of money to the State of Michigan and local units of government in accordance with the terms of the Compacts. In 2002, "Michigan's 16 Indian casinos had gambling revenues of $895.3 million." State Sees Slow Growth in Indian Casinos, Detroit News, June 1, 2003, available at www.detnews.com/2003/business/0306/01/b01-179499.htm

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[2] A ruling that the 1998 compacts are invalid may create a large amount of potential contract breach liability for the State of Michigan and dozens of local units of governments that have benefited from these payments. Neither the State nor local governments are immune from contract claims brought against them. See Koenig v City of South Haven, 460 Mich 667, 675; 597 NW2d 99 (1999) (citing Ross v Consumers Power Co. (On Rehearing), 420 Mich 567, 647; 363 NW2d 641 (1984)); see also Davidson v State, 42 Mich App 80, 83; 201 NW2d 296 (1972) ("The State never had and does not have immunity from suit in actions arising out of contracts to which it is a party.") (citing Zynda v Michigan Aeronatics Commission, 372 Mich 285, 287; 125 NW2d 858 (1964)).

The 1998 Compact Tribes relied upon the representation of the State of Michigan through both the Governor who executed the Compacts and the Michigan Legislature that approved the Compacts via joint resolution. The Tribes performed their end of the bargain; specifically, the Tribes paid millions of dollars to the State and to local units of government with the reasonable understanding that they had a valid compact.

The State of Michigan also may be liable for lost profits and out-of-pocket expenses incurred by the 1998 Compact Tribes in performance of the Compact based on their detrimental reliance on the State's representations that the Compacts were valid. Moreover, there are nearly ten years remaining on the 1993 Compacts, which are due to expire in 2013. "Damages awarded in promissory estoppel actions may include an award of lost profits ... and out-of-pocket expenses incurred in preparation of performance or in the performing of the work that was induced by the promisor." Joerger v Gordon Food Service, Inc, 224 Mich App 167, 174; 568 NW2d 365 (1997) (citations omitted). See also Charter Twp of Ypsilanti v General Motors Corp, 201 Mich App 128, 133-34; 506 NW2d 556 (1993) (stating the elements of a promissory estoppel contract claim) (quoting Restatement (Second) of Contracts § 90(1) (1981)), lv denied, 443 Mich 882; 509 NW2d 152 (1993). Local units of government that benefited unjustly are subject to damage claims. See, e.g., Booker v City of Detroit, __ Mich __; 668 NW2d 623, 623 (2003). The State also may be subject to breach of contract liability. See, e.g., Cordova Chemical Co v Dept of Natural Resources, 212 Mich App 144, 151-52; 536 NW2d 860 (1995), lv denied, 453 Mich 901; 554 NW2d 319 (1996).

(last visited June 2, 2003). It follows that local units of government receive nearly $18 million in 2% payments a year. Since 1994, the compacting Tribes have contributed over $99 million to local units of government in accordance with the compacts. See Michigan Gaming Control Board, 2% Slot Revenue Payments to Local Units of Government, available at www.michigan.gov/documents/2_percent_Payments_76617_7.pdf (last visited Dec. 14, 2003). Since 1993, the compacting Tribes have contributed over $225 million to Michigan's Strategic Fund in accordance with the compacts. See Michigan Gaming Control Board, 8% Slot Revenue Payments to the Michigan Strategic Fund, available at www.michigan.gov/documents/8_percent_Payments_76616_7.pdf (last visited Dec. 14, 2003). The Grand Traverse Band, a signatory to the 1993 Compacts, alone distributes an average of nearly $2 million per year to local education programs, schools, fire, police, and emergency response departments, and county public service commissions. See, e.g., Gaming Revenue to Benefit 53 Causes, Traverse City Record-Eagle, Feb. 6, 2003, available at www.record-eagle.com/2003/feb/06tribe.htm (last visited Feb. 18, 2003) (reporting that the Grand Traverse Band delivered $1,088,905 to local units of government in its winter semi-annual distribution); GT Band Disburses Gaming Revenues, Traverse City Record-Eagle, Aug. 3, 2002, available at www.record-eagle.com/2002/aug/03band.htm (last visited Aug. 7, 2002) (reporting that the Grand Traverse Band delivered $951,700 to local units of government in its summer semi-annual distribution). Two percent distributions provide a much-needed buffer for local

units of government suffering from massive State budget cuts. Invalidating the compacts ends the compacting Tribes' responsibility to distribute these funds to the local units of government. Cf. Sault Ste Marie III, 93 F Supp 2d at 854.

Local units of government also benefit from the 1998 Compacts in other forms of government-to-government cooperation. See TOMAC v Norton, 193 F Supp 2d 182, 186 (D DC 2002) ("Local governments in the area expect to receive significant revenues through cooperation agreements with the Pokagon [Band of Potawatomi Indians]."). With the promise of gaming revenues and the concomitant enhancement of tribal government structures, the Pokagon Band of Potawatomi Indians have already entered into a cooperative agreement with the local county Sheriff's department. See Van Buren County Sheriff Plans for Impact of Pokagon Agreement, St. Joseph-Benton Harbor Herald-Palladium, Sept. 30, 2003, available at http://www.heraldpalladium.com/articles/2003/09/30/ news/news3.txt (discussing cross-deputization agreement involving Pokagon Band). With gaming revenues, Michigan Indian Tribes have been able to create a tradition of cooperation with local public safety departments. See Brief of Amicus Curiae National Congress of American Indians, National Indian Gaming Commission, and Individual Tribes at 12-17, 24-26, Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, 538 US 701; 123 S. Ct. 1887; 155 L Ed 2d 933 (2003) (describing the cooperative law enforcement agreements between local units of government and the Grand Traverse Band of Ottawa and Chippewa Indians and Little Traverse Bay Bands of

Odawa Indians), available at 2003 WL 742053. All of the Amicus Tribes have entered into cooperative agreements with local jurisdictions. See National Congress of American Indians, www.ncai.org/main/pages/issues/governance/agreements/law_enforcement_agreements.asp#MI (last visited Dec. 14, 2003) (listing agreements between local jurisdictions and the Grand Traverse Band and the Hannahville Indian Community). The Grand Traverse Band, for example, "regularly provides governmental documents, surveillance tapes and other information to state and county officials in connection with their investigation and prosecution of crime." Brief of National Congress of American Indians, supra, at 25.

The establishment and continued funding of Tribal Courts with gaming revenues has helped to foster the creation of Michigan Court Rule 2.615, which allows for the enforcement of Tribal Court judgments in state courts and state court judgments in Tribal Courts. See generally Hon. Michael F. Cavanaugh, Michigan's Story: State and Tribal Courts Try To Do the Right Thing, 76 U Det Mercy L Rev 709 (1999) (describing the genesis of MCR 2.615).

The emerging spirit of cooperation between the State and the compacting Tribes embodied in the inter-governmental agreements and in MCR 2.615 has lead to the Michigan Tribal-State Tax Agreements. Several Michigan Tribes have signed tax agreements with the State, four of whom have implemented and are operating under the agreement. See, e.g, Tax Agreement Between the Bay Mills Indian Community and the State, www.michigan.gov/documents/BayMills

FinalTaxAgreement_61196_7.pdf (last visited Dec 17, 2003); Tax Agreement Between the Hannahville Indian Community and the State, www.michigan.gov/documents/HannahvilleAgreement_58669_7.pdf (last visited Dec 17, 2003); Tax Agreement Between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan, www.michigan.gov/documents/LTBB_Agreement_58762_7.pdf (last visited Dec 17, 2003).

It is clear that a ruling adverse to the State could lead to the closure of at least two Indian gaming facilities and could create a domino effect of increased Tribal unemployment, the shuttering of Tribal government services, and a return to the extreme poverty visited upon Michigan reservations in the 1970's. Moreover, a ruling adverse to the State in this matter would ensure that non-Indian communities that have benefited from Indian gaming revenues directly and indirectly would suffer from increased unemployment, reduced tourism revenues, and the loss of critical funds needed to support public safety, educational, and other public services. The spirit of cooperation developing between Michigan Tribes and the local jurisdictions would be at risk, to the detriment of all. Finally, the State of Michigan would suffer from a large increase of former casino employees filing for public assistance and from a massive loss in gaming revenue still paid out by the 1998 compacting Tribes in accordance with the compacts. In short, the loss of gaming revenues would be nothing less than utterly devastating.

II. The Public Policy of the State of Michigan Does Not Disfavor Indian Gaming.

Michigan law has developed to the point that gaming is accepted by the People of the State of Michigan. It is fallacious to argue that public policy remains against gambling as Amicus Grand Rapids Area Chamber of Commerce has argued. See Brief of Amicus Curiae Grand Rapids Area Chamber of Commerce at 7 (citing State ex rel Comm'r of State Police v Nine Money Fall Games, 130 Mich App 414; 343 NW2d 576 (1983)). At least one court recently has opined that Michigan's statutes governing gaming must now be construed as regulatory. See Grand Traverse Band II, 198 F Supp 2d at 705 ("Where, as in Michigan, a state operates a wide range of gambling sites and has a public lottery, the statutes must be principally viewed as regulatory.") (citing Cabazon Band, 480 US at 211). Moreover, as a blue ribbon panel appointed by former Governor Engler concluded as far back as 1995, "Society now tolerates gambling, which has entered everyday lives in many ways including lotteries, bingo, horse-race betting and illegal sports betting. Because of society's toleration of gambling, the Committee suggests that if extension of gambling represents a shift of the moral compass, it is a small one." Governor's Blue Ribbon Commission on Michigan Gaming, Blue Ribbon Report: Executive Summary (April 11, 1995), available at http://www.michigan.gov/mgcb/0,1607,7-120-1382_1452-14473--,00.html (last visited Dec. 12, 2003).

This Court's decision in Michigan Gaming Institute, Inc v State Board of Education, 451 Mich 899; 547 NW2d 882 (1996), is not dispositive, nor indicative

of the current reality of the public policy of the State of Michigan. In that case, the Court of Appeals, in a 2-1 decision, opined that "[b]y permitting some forms of gambling, including millionaire parties, lotteries, bingo, and horse betting, the Legislature has shown that the public policy of this state does not absolutely prohibit gambling and has advertised that public policy would permit casino gambling on Indian reservations." See 211 Mich App 514, 518; 536 NW2d 289 (1995), rev'd, 451 Mich 899; 547 NW2d 882 (1996). The dissent in that case, later adopted by this Court in lieu of its own opinion, noted that "[p]ublic opinion is obviously in flux on this question." See id. at 521 (Corrigan, J, dissenting). Judge Corrigan further noted that the "Legislature is the final arbiter of this state's public policy." Id at 522. That case turned on the public policy determination made by a state agency, not a determination by the Michigan Legislature. See id at 521. At the time the Court of Appeals opinion was released, the State ran a lottery system, see MCL §§ 432.1 et seq, bingo and millionaire parties were legal, see MCL §§ 432.101 et seq, and horse-race betting was legal, see MCL §§ 431.61 et seq. In 1996, the People of the State of Michigan adopted "Proposal E" and the Legislature enacted amendments to Proposal E, both of which are now codified as the Michigan Gaming Control and Revenue Act, MCL §§ 432.201 et seq. The statute allows the Michigan Gaming Control Board to license up to three casinos in the City of Detroit. There can be no serious doubt that the Michigan Legislature and the People of the State of Michigan have spoken since this Court's decision in Michigan Gaming Institute. As the Sixth Circuit observed without qualification,

"casino gambling in Detroit [is] legal." Lac Vieux Desert Band of Lake Superior Chippewa Indians v Michigan Gaming Control Board, 276 F3d 876, 878 (CA6), cert denied, 536 US 923; 122 S Ct 2589; 153 L Ed 2d 779 (2002).

It can now be stated with certainty that Michigan public policy is no longer strongly against gaming. In fact, at least one Detroit newspaper of record reported that gaming in the Detroit metropolitan area is moving toward "saturation." Racetracks, Taxes Add to Fight for Customers: Area Moving Towards Venue Saturation Level, Detroit Free Press, May 30, 2003, available at www.freep.com/news/casinos/casino30_20030530.htm (last visited June 3, 2003). Gaming is so pervasive that the Michigan Legislature seriously contemplates the broad expansion of gaming virtually each session. See, e.g., HB 4609 through 4612 (2003) (allowing for the expansion throughout the State of slot machine-style terminals at several horse tracks, commonly referred to as "Racinos"); HB 5284 through 5289 (2002) (same). The State of Michigan has even begun to offer keno. See Lottery Adding Bar Keno Game, Lansing State J, Sept 14, 2003, available at http://www.lsj.com/news/capitol/030914_lottery_1a-4a.html (last visited Dec 15, 2003). In the arena of Indian gaming, keno is a Class III game. See Sisseton-Wahpeton Sioux Tribe v United States, 804 F Supp 1199 (D SD 1992). If the State of Michigan itself is operating a Class III-type game, then public policy must no longer be against gaming.

III. In the Event this Court Rules Against the State, this Court Should Limit the Applicability of Its Ruling In Order to Avoid Injustice.

Prospective application of a holding is appropriate when the holding overrules settled precedent or decides an "'issue of first impression whose resolution was not clearly foreshadowed.'" Lindsey v Harper Hospital, 455 Mich 56; 564 NW2d 861 (1997) (quoting People v Phillips, 416 Mich 63; 330 NW2d 366 (1982)). As stated above, it is the position of Amici Tribes that the resolution process is the proper procedure for ratification of a contract between two sovereigns. However, should this Court find that tribal gaming compacts must be approved by legislation instead of by resolution, the ruling should be limited to prospective application to any prospective compacts that have not yet been submitted to the legislature for approval by resolution.

This Court recognized in Dearborn Fire Fighters v Dearborn, 394 Mich 229; 231 NW2d 226 (1975), that decisions holding legislative acts unconstitutional have, on occasion, been given limited retroactivity in recognition of the necessities of governmental administration and the potential to impose extreme hardship on affected parties. This reflects the same findings as the United States Supreme Court which found that where a decision of the Court could produce substantial inequitable results where, if applied retroactively, "there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v City of Houma, 395 US 701, 706; 89 S Ct 1897; 23 L Ed 2d 647 (1969) (quoting Tidal Oil Co v Flanagan, 263 US 444, 450; 44 S Ct

197; 68 L Ed 2d 382 (1965)); see also Fleming v Fleming, 264 US 29, 31; 44 S Ct 246; 68 L Ed 547 (1924); Brinherhoff-Faris Co. v Hill, 281 US 673, 680; 50 S Ct 451; 75 L Ed 1107 (1930). The Supreme Court outlined the factors applied in cases dealing with the nonretroactivity question in Chevron Oil Co v Huson, 404 US 97; 92 S Ct 349; 30 L Ed 2d 296 (1971). This Court has also applied the three-part test set forth in Chevron. See Michigan Educational Employees Mutual Ins Co v Morris, 460 Mich 180, 189; 596 NW2d 142 (1999):

> (1) the decision applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Allen v State Board of Elections, 393 US 544; 89 S Ct 817; 22 L Ed 2d 1 (1969).
>
> (2) Weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Linkletter v Walker, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965).
>
> (3) Weigh the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' Cipriano, supra, 460 Mich at 1900. [Michigan Educational Employees Mutual Ins Co, supra, at 180 (quoting, Chevron, supra, at 107).]

A. A Decision Holding that the Legislature Must Approve Gaming Compacts by Legislation Instead of by Concurrent Resolution Overrules Past Precedent on Which the Tribes Relied in Pursuing Compact Approval.

This Court must presume the deliberate act of the Legislature, in passing a concurrent resolution approving the gaming compacts, was constitutional. See Young v City of Ann Arbor, 267 Mich 241, 243; 255 NW 579 (1934) ("[A]ll

presumptions are in favor of the constitutionality of the deliberate acts of a coordinate department of government.").

The issue of whether the tribal-state gaming compacts must be approved by legislation, rather than a concurrent resolution, is an issue of first impression for this Court and the parties involved. As such, neither the Tribes nor the State could have presumed a resolution may not be legally sufficient. In Allen, the United States Supreme Court refused to retroactively apply a corrective action to past voting legislation, where the result would be great consequence, and where the questions challenged involved "complex issues of first impression—issues subject to rational disagreement." Allen, supra, 393 US at 572. There, the appellants urged the Court to declare past state elections, held under state laws later found in conflict with federal law, void and ordered new elections. The Court refused to a retroactive remedy as the issue was of first impression and involved complex applications. See id.

This Court has stated that "[a]ppreciation of the effect a change in settled law can have has led this Court to favor only limited retroactivity when overruling prior law." Michigan Educational Employees Mutual Ins Co, supra, 460 Mich at 190 (quoting Tebo v Havlik, 418 Mich 360; 343 NW2d 181 (1984)). In addition to the four compacts at issue in this litigation, the original seven compacted tribes and most recently the Gun Lake Tribe, have invested millions of dollars and time in the resolution process, and relied on the assurances of government officials is

pursuing compacts through resolution as a legal and presumptively valid means of approval.

Just as in Allen, a retroactive application of a Court decision that would invalidate or void compacts already passed by concurrent resolution, would be inappropriate because the questions raised involve a complex legal issue of first impression. Further, due to the presumed validity of the resolutions under Young, the Indian tribes and the State have both taken substantial steps in reliance on the validity of the compacts involved. This Court and Appellants' cannot presume that the Tribes' with resolution passed compacts could foresee that the State's consistent enforcement and interpretation of the Compacts would be overturned at a later date.

B. Retroactive Application Of A Finding Of Unconstitutionality Does Not Further The Purpose Of The Enactment Clause Of The Michigan Constitution.

Since 1993, the Tribes, State and the Federal government, have relied upon and enforced Michigan Tribal-State Gaming Compacts passed by concurrent resolution. Millions of dollars have been paid to tribal, state and local governments in reliance on these compacts. Further, hundreds of millions of dollars have been borrowed and/or invested by tribes in reliance on these compacts. The existence and enforcement of the original seven compacts is an operative fact that Appellees relied on in negotiating subsequent compacts approved by resolution. In addition to the seven original compacts enforced and recognized by the State, the Gun Lake Tribe further relied on the validity of this process when Governor Engler urged it

to actively pursue a compact with the legislature, by resolution. See Engler Letter, supra.

In Linkletter, the Court refused to apply a Court ruling retroactively because doing so would not further the purpose and effect of the underlying rule. See id, 381 US at 627-29. There, the Court was asked to retroactively apply the exclusionary rule outlined in Mapp v Ohio, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961), to cases decided prior to Mapp. While the Court recognized the rights involved were fundamental, the State had consistently enforced the laws and procedures in reliance on their effectiveness and validity. Retrospective application of the rule would not do anything to further the purpose of the rule, which is to punish overzealous police officers.

As in Linkletter, retroactively voiding the resolutions would not further the purpose of the underlying rule—here the Enactment Clause of the Michigan Constitution. See Const 1963, art 4, § 22. The purpose of the Enactment Clause is to allow the Legislature to speak. See generally Brief of State of Michigan, Part II(B). Surely, it would not further the purposes of the Enactment Clause to override the will of the Legislature where it has explicitly spoken in the form of a joint resolution. As stated above, the State, the federal government, and the Indian tribes have enforced and followed the terms included in these compacts as valid law. A retroactive application would only produce substantial inequitable results to all parties involved and burden Appellees more than it would benefit Appellants. See Lesner v Liquid Disposal, Inc, 466 Mich 95, 109; 643 NW2d 553

(2002) (refusing to apply ruling retroactively where there was "widespread reliance" on former precedent); Pohutski v City of Allen Park, 465 Mich 675, 698; 641 NW2d 219 (2002) (correcting an error in the interpretation of a statute calls for only prospective application). Such a result may also require the return of millions of dollars paid to local governments and undermine the revenues and institutions that have allowed for cooperative agreements between the tribes and local governments.

C. Significant Hardships May Be Imposed On All Michigan Tribes that Have Compacts Approved by Resolutions If A Finding Of Unconstitutionality Were Given Full Retroactive Effect.

The significant economic and social consequences resulting from the retroactive application of a ruling against the State counsels this Court to limit the application of such a ruling. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding injustice or hardship by a holding of nonretroactivity. See Lesner, 466 Mich at 109; Pohutski, 465 Mich at 698.

The presumption of constitutional validity justifies the significant reliance demonstrated by all Michigan tribes that have compacts approved by resolution. Cf Lemon v Kurtzman, 411 US 192; 93 S Ct 1463; 36 L Ed 2d 151 (1973) (discussing Allen, supra). The Appellants are effectively asking this Court to unravel presumptively valid legislative acts. The appellants wrongly assert that the parties had knowledge that approving compacts through resolution would be unconstitutional prior to passing the resolution in 1998. At least one other

Michigan Court of Appeals decision rejected the theory of the Attorney General in Opinion 6960 (Oct 21, 1997). See McCartney, 231 Mich App 726-30. The law was far from settled on this issue by the final arbiter of Michigan Law, this Court.

It has long been recognized that a hallmark of equity is its concern for the totality of the circumstances in which it is asked to intervene. See Lemon, supra, 411 US at 201. As the United States Supreme Court held in Eccles v Peoples Band of Lakewood Village, Cal, 333 US 426, 431; 68 S Ct 641; 92 L Ed 794 (1948): "It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving desired relief."[3] In Lesner, this Court overruled Weems v Chrysler Corp, 448 Mich 679; 533 NW2d 287 (1995), but refused to apply the ruling retroactively. See Lesner, 465 Mich at 109 ("Further, attempting to revisit the benefit levels finally determined or agreed upon during the period that Weems was controlling authority could have a detrimental effect on the administration of justice by imposing an enormous burden on the worker's compensation system, not to mention the reliance of the beneficiaries on the benefits previously awarded under Weems."). In Lemon, the Court found that a position, such as Appellants, could "serious[ly] undermine the initiative of state legislators and executive officials alike." 411 US at 208. There, State legislators and executives distributed money to parochial schools. Prior to the disbursement,

[3] The Supreme Court has also held that: "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." Lemon, supra, 411 US at 201; see also Reynold v Sims, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964) (although Court found legislative apportionment scheme unconstitutional, Court must weigh circumstances to determine whether it is equitable to enjoin pending election based on unconstitutional apportionment scheme).

there had been some disagreement about the constitutionality of such an act. However, the Court found that when "there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review." Id at 209. As a result, the Court determined when applying equitable principles to the "totality of the circumstances," including reliance of the parties, and the presumption of validity, prospective application would not undermine the constitutional interests involved. See Stanton v Lloyd Hammond Produce Farms, 400 Mich 135; 253 NW2d 114 (1977) (quoting Dearborn Fire Fighters Union, supra):

> "In addition to the almost insurmountable administrative, political, and judicial problems that would be created by any attempt to unravel and renegotiate the 'contracts' imposed...application on this decision retroactively would cause hardship...and would not be constructive." [Dearborn Fire Fighters Union, supra, 394 US at 371-72.]

The four Indian tribes involved in this action, as well as the original seven compacted tribes and the Gun Lake Tribe have invested extensive time in the resolution process as a valid exercise. For the Gun Lake Tribe, up to four (4) years have been invested in assembling coalitions, meeting with legislators and testifying at hearings, all in good faith. The 1993 Compact Tribes have been gaming under their compacts for over ten years and many of those Tribes have been gaming legally since the early 1980s.

In reliance on the validity of the compacts negotiated through the governor and then ratified through resolution, the Gun Lake Tribe and the four Indian tribes,

involved in this action have taken substantial steps in furtherance of their positions. The Tribes, since the resolutions approving its compacts were passed, have borrowed millions of dollars in reliance of the Governor and legislators advice that the resolution process is valid. In addition, the tribes have invested millions of dollars in preparation of a gaming facility, including environmental studies, architect fees, and legal fees. In addition to the financial investment, the Gun Lake Tribe has extended a great deal of time reaching out to the local communities for comment and input in a showing of good will. The tribes with compacts at issue in this lawsuit have also invested millions of dollars in preparatory costs, and for two of the tribes, the Little River Band and the Little Traverse Bay Bands, in actual resort facilities.

Further, in reliance on the validity of the tribal-state compacts, the Little Traverse Bay Bands and the Little River Band have made good faith payments to the State and to local units of government pursuant to the negotiated compact. The Little River Band has contributed at least $22,768,628.39 to the Michigan Strategic Fund and at least $5,355,002.05 to the local governments. The Little Traverse Bay Bands have contributed at least $11,552,976.03 to the Michigan Strategic Fund, and at least $2,886,142.92 to the local governments. See 8% Slot Revenue Payments to the Michigan Strategic Fund, supra; % Slot Revenue Payments to Local Units of Government; supra.

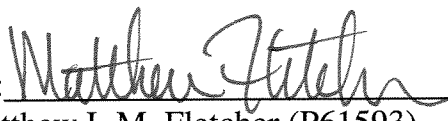
The retroactive application of a finding that the resolution is not the proper procedure for compact approval would burden Appellee and Tribes more than it

would benefit Appellant. The Tribes relied on the validity of a compact approved by resolution. As such, the totality of the circumstances here does not support a retroactive finding of unconstitutionality. Further, Gun Lake has taken substantial steps to set up much-needed government programs for its membership in furtherance of self-sufficiency.

CONCLUSION

For the above reasons and the reasons stated in the briefs of the Defendants, the Intervening Defendants, and the Amici Curiae Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Nottawaseppi Huron Band of Potawatomi Indians, and Pokagon Band of Potawatomi Indians, the Amici Tribes urge this Court to affirm the decision of the Court of Appeals.

Dated: December 23, 2003

By: 

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STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

JOHN ENGLER
GOVERNOR

May 3, 2000

Mr. John M. Peebles, Esq.
Monteau, Peebles and Marks, LLP
12100 West Center Road, Suite 202
Bel Air Plaza
Omaha, NE 68144-3960

Re: Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan

Dear Mr. Peebles:

I am writing in response to Chairman D.K. Sprague's request that I contact you to make arrangements to negotiate with the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan a/k/a Gun Lake Band for the purpose of concluding a Tribal-State Compact governing the conduct of Class III gaming.

I am well aware that the Indian Gaming Regulatory Act ("IGRA") requires a state to negotiate in good faith with a federally recognized tribe requesting a gaming compact. IGRA, however, is silent as to the appropriate state entity to negotiate and as to how a tribe should go about contacting a state to request negotiations. In the past, I have negotiated compacts, which I have then presented to the Michigan Legislature for ratification by concurrent resolution -- only upon this exercise of the Legislature's contracting power have these compacts become legally effective under Michigan law.

As you may be aware, in 1998, I informed Representative (now Speaker) Perricone and other members of the Michigan Legislature that I will not enter into negotiations for a Tribal-State Class III gaming compact with any tribe recognized after January 1, 1999, or with the Gun Lake Band. Accordingly, should the Gun Lake Band wish to pursue a compact, the tribe should contact the Legislature. They could then either negotiate and enter into a compact with the tribe or direct me to negotiate a compact which I could then present for legislative approval. Please note that in 1999, both

houses of the Michigan Legislature created Gaming and Casino Oversight Committees, which, along with legislative leadership, provide your Lansing representative with a logical place to begin the process of seeking compact negotiations.

Sincerely,

John Engler
Governor

JE/lb/jp
cc: Noel LaPorte
Chairman D.K. Sprague